Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: National Guard--Fiscal Year to be Charged for Mandated Uniform Purchases (Reconsideration)

File: B-265901

Date: October 14, 1997

DIGEST

The National Guard Bureau, Louisiana, may use its fiscal year 1993 and 1994 Operation and Maintenance appropriations to pay uniform allowances to National Guard military technicians. Under 31 U.S.C. § 1553(a), balances in annual appropriations accounts remain available for five years after they expire for recording, adjusting or liquidating obligations properly made during their period of availability. The order of the Federal Service Impasses Panel, dated May 13, 1992, requiring the National Guard and the National Federation of Federal Employees to include a provision in their yearly collective bargaining agreement entitling military technicians to receive either a uniform or a uniform allowance each year, obligated fiscal year 1993 and 1994 funds to the extent of payments of uniform allowance for those years.

DECISION

The Chief Counsel, National Guard Bureau, Departments of the Army and the Air Force requests that we reconsider our decision, National Guard--Fiscal Year to be Charged for Mandated Uniform Purchases, B-265901, June 30, 1997. In that decision we decided that the Louisiana National Guard Bureau could not use its fiscal year 1992, 1993 or 1994 Operation and Maintenance funds to pay for uniforms provided to military technicians in fiscal years 1995 or later. The Chief Counsel asks that we modify our decision based on his restatement of the facts and a 1996 amendment to the law applicable to this matter. For the reasons indicated below, we conclude that the Louisiana National Guard Board may use fiscal year 1993 and 1994 funds to pay uniform allowances to technicians so long as those allowances are paid to fulfill requirements that arose in those years.[1]

[1]Under 31 U.S.C. § 1552(a), the fiscal year 1992 appropriation account was closed September 30, 1997, and is therefore no longer available for any purpose.

Background

As we indicated in our earlier decision, under 10 U.S.C. § 1593(a) the Secretary of Defense is authorized to pay an allowance, or to provide a uniform, to each civilian employee of the Department of Defense who is required by law to wear a uniform while performing official duties. The amount of allowance paid and the cost of the uniforms provided to each employee "may not exceed $400 per year." 10 U.S.C. § 1593(b). Amounts appropriated to the Department of Defense for the pay of civilian employees are available to purchase uniforms or to provide a uniform allowance. 10 U.S.C. § 1593(d). During fiscal years 1992, 1993 and 1994, National Guard military technicians were civilian employees required to wear uniforms in performing their official duties. Therefore, the Department could provide them a uniform allowance or uniforms under 10 U.S.C. § 1593.

A Louisiana local of the National Federation of Federal Employees (union) is the collective bargaining unit representing military technicians working for the National Guard in Louisiana. In negotiating a collective bargaining agreement, the National Guard and the union reached an impasse over the amount, if any, that should be spent providing uniforms or uniform allowances to technicians. The parties submitted their dispute to the Federal Service Impasses Panel for resolution. After considering arguments of the parties, the Panel issued its decision on May 13, 1992. The Panel ordered the parties to include the following provision in their collective bargaining agreement:

> "(1) For those employees who are required to wear a prescribed uniform not furnished by the Employer, an annual allowance of $400 shall be provided for the initial purchase, upkeep, and replacement of such uniforms; (2) for those employees who are required to wear a prescribed uniform which is furnished by the Employer, it shall provide each year uniforms worth $400."

Department of Defense, National Guard Bureau, Louisiana Army and Air Force National Guard, Jackson Barracks, New Orleans, Louisiana and Council of Louisiana National Guard Locals, National Federation of Federal Employees, Case No. 92 FSIP 85 (Federal Service Impasses Panel, 1992).

On June 9, 1992, the Chief, Labor and Employee Services Division for the National Guard, acting on behalf of the agency head, issued a letter disapproving and refusing to adopt and implement the Panel's order. The stated reason for disapproving the order was that the National Guard had no statutory authority to provide uniforms or uniform allowances to military technicians. On June 16, 1992, the union filed an unfair labor practices charge with the Federal Labor Relations Authority (FLRA), arguing that the National Guard violated 5 U.S.C. §§ 7116(a)(1) and (6) by refusing to adopt and implement the Panel's decision.

The FLRA, on July 15, 1993, issued its decision and order agreeing with the union that the National Guard's refusal to implement the Panel's decision constituted an unfair labor practice. The FLRA rejected the National Guard argument that it had no authority to comply with the order, indicating that this issue had previously been resolved in favor of the union in a case involving the Illinois National Guard. The FLRA ordered the National Guard to cease and desist from

> "Failing and refusing to comply with the Decision and Order of the Federal Service Impasses Panel in Case No. 92 FSIP 85 by failing and refusing to adopt the language ordered by the Panel regarding the payment of uniform allowances and the allocation of uniforms."

The FLRA further ordered the National Guard to

> "Comply with the Decision and Order of the Federal Service Impasses Panel in Case No. 92 FSIP 85 by adopting the language ordered by the Panel regarding the payment of uniform allowances and the allocation of uniforms."

National Guard Bureau and National Federation of Federal Employees, 47 FLRA 109 at p. 1177 (July 15, 1993). The FLRA order did not specify that it was retroactive to the date of the Panel order.

In September 1993, the National Guard withdrew its disapproval of the Panel order. On October 26, 1993, the parties amended their collective bargaining agreement to include the language contained in the Panel order. The amendment stated that it was effective June 9, 1992 (the date that the National Guard had originally refused to adopt the Panel order).

The uniform provision in the collective bargaining agreement was not immediately implemented. On August 19, 1994, the Adjutant General of Louisiana issued a memorandum indicating that the National Guard would comply with the uniform requirement by providing $400 worth of uniforms, rather than a uniform allowance, each year. In fiscal year 1995, the National Guard sought legal guidance from its counsel on the proper funds to use to fulfill the contractual uniform requirement. Counsel recommended that guidance be sought from this office concerning the funding of the uniform provision arising by virtue of the order of the Federal Service Impasses Panel.

Discussion

In our earlier decision, we stated:

> "The National Guard's responsibility to provide uniforms or uniform allowances to military technicians dates back to fiscal year 1993 and possibly to 1992. However, it did not provide uniforms or uniform allowances to technicians in fiscal year 1992, 1993 or 1994. Further, the National Guard has decided it will fulfill its responsibility only by furnishing uniforms to technicians; it will not provide them with monetary uniform allowances."

Further, we assumed that the uniforms that the National Guard would be providing to technicians each year would be in fulfillment of its collective bargaining obligation for that year, not its obligation for earlier years. We therefore concluded that the National Guard's bona fide need to provide uniforms to its technicians under the collective bargaining agreement arises in the year it acquires those uniforms, and that it must obligate the funds current at that time for the cost of the uniforms. It followed that the National Guard could not use its fiscal year 1992, 1993 or 1994 funds to pay for uniforms it acquired in fiscal year 1995 or later to fulfill its responsibility under the collective bargaining agreement for those later years.

The Chief Counsel argues that we should amend our earlier decision for two reasons. First, he points out that in 1996 the Congress enacted legislation that changed the status of National Guard technicians and the manner in which they are to receive uniforms. Section 1038 of the National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 432 (1996), is titled "Wearing of Uniforms by National Guard Technicians."[2] It amended 32 U.S.C. § 709(b) to provide that technicians are (1) members of the National Guard, (2) holding the specified military grade for that position, and (3) must wear the uniform appropriate for that grade. It also amended 37 U.S.C. §§ 417 and 418 to provide that technicians would receive uniforms (or allowances) under the authority of title 37 and could no longer be paid uniform allowances or receive uniforms under 10 U.S.C. § 1593. The Chief Counsel then states:

> "Based on the aforementioned changes in law, the authority to use O&M funds to provide dual-status National Guard technicians with uniforms or a uniform allowance under 10 U.S.C § 1593 . . . no longer exists. The only uniform authorities that now apply to technicians are

[2]As clarified by section 654 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, 110 Stat. 2422, 2583.

> those that apply to military members in general, and therefore, the uniform needs of technicians in the current fiscal year and future fiscal years arising from their duties both as military members and as National Guard technicians can only be satisfied from military personnel funds . . . ."

Second, the Chief Counsel points out that contrary to the assumption in our earlier decision, the National Guard is planning to use O&M funds to provide uniforms to technicians in fulfillment of its requirements to do so in earlier fiscal years. He states:

> "The only reason the National Guard is planning to use O&M funds to purchase uniforms for technicians in the current fiscal year is to satisfy the obligations that arose, but were not satisfied, under collective bargaining agreements applicable to the fiscal years prior to the [statutory] amendments discussed above . . . ."

Further, subsequent to our receiving the Chief Counsel's letter, representatives of his office informed us that the United States Property and Fiscal Officer (USPFO) for Louisiana has now agreed to pay uniform allowances, rather than providing uniforms, for fiscal years 1992, 1993 and 1994.

Based on the Chief Counsel's letter, we must reconsider our June 1997 decision. The amendments to the law, as well as the Chief Counsel's statement of the National Guard's intentions, indicate that contrary to our assumptions in our earlier decision the Guard will not be purchasing uniforms to fulfill its current requirements under the collective bargaining agreement. Rather, the Guard will be paying uniform allowances to fulfill the obligations arising under the collective bargaining agreements only for the years prior to the amendment of the law. We, therefore, must determine whether fiscal year 1992, 1993 and 1994 funds are still available to pay for uniform allowances to National Guard technicians.

According to the original National Guard submission, the uniforms provided or uniform allowances paid each year to military technicians under the modified terms of the collective bargaining agreement are chargeable to the Operation and Maintenance appropriations of the Army and Air National Guards. The Operation and Maintenance appropriations are annual appropriations. They are available to incur new obligations only during the fiscal year for which they are enacted. After the expiration of that one-year period of availability, the balances in the annual appropriation accounts remain available for an additional period of five years "for

recording, adjusting, and liquidating obligations properly chargeable to that account." 31 U.S.C. § 1553 (a).[3] Therefore, if obligations for the cost of paying uniform allowances to union members were incurred in fiscal years 1993 and 1994, the Operation and Maintenance appropriations for those years may still be used to pay for those uniforms.

We have said that an obligation exists when there is a definite commitment which creates a legal liability on behalf of the United States to pay appropriated funds for goods or services. B-116795, June 18, 1954. In the context of this case, the duty to either provide uniforms or pay a uniform allowance arose when the National Guard was legally required to provide those uniforms or pay allowances. To answer the issue now before us, namely, when an obligation arose to pay an allowance, we must determine the authority of the Panel and the effect of its order.

The Federal Service Impasses Panel is an entity within the FLRA, the function of which is to help resolve negotiating impasses between agencies and unions. 5 U.S.C. § 7119(c)(1). Either or both parties may request the involvement of the Panel when other voluntary arrangements have failed to resolve an impasse. 5 U.S.C. § 7119(b). The Panel is authorized to assist the parties in resolving the impasse "through whatever methods and procedures . . . it may consider appropriate . . ." 5 U.S.C. § 7119 (c)(5)(A)(ii). If the parties do not reach agreement after assistance by the Panel, the Panel is authorized to:

> "(i) hold hearings;
> "(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpoenas . . . ; and

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[3]For the three fiscal years mentioned in the submission, the final dates of availability for incurring new obligations and for recording, adjusting, and liquidating existing obligations are set forth in the following table:

Fiscal Year	Incurring new obligations	Recording, adjusting, and liquidating existing obligations
1992	September 30, 1992	Account Closed September 30, 1997 under 31 U.S.C. § 1552(a)
1993	September 30, 1993	September 30, 1998
1994	September 30, 1994	September 30, 1999

> "(iii) take whatever action is necessary and not inconsistent with this chapter [5 U.S.C. Chapter 71--Labor-Management Relations] to resolve the impasse."

5 U.S.C. § 7119(c)(5)(B). Final action taken by the Panel "shall be binding on such parties during the term of the [collective bargaining] agreement, unless the parties agree otherwise." 5 U.S.C. § 7119(c)(5)(C).

The regulations implementing the Panel's authorities provide that if the parties do not reach a settlement as a result of assistance provided by the Panel,

> "the Panel may take whatever action is necessary and not inconsistent with 5 U.S.C. chapter 71 to resolve the impasse, including but not limited to, methods and procedures which the Panel considers appropriate, such as directing the parties to accept a factfinder's recommendations, ordering binding arbitration conducted according to whatever procedure the Panel deems suitable, and rendering a binding decision."

5 C.F.R. § 2471.11(a). The regulation repeats the statutory pronouncement that the Panel's final action shall be binding on the parties during the term of the collective bargaining agreement, unless they agree otherwise.

Section 7114(c) of Title 5 provides that an agreement between an agency and a union shall be subject to approval by the head of the agency. The agency must approve the agreement within 30 days "from the date the agreement is executed" if it is consistent with 5 U.S.C. chapter 71 and all other applicable laws, rules and regulations. 5 U.S.C. § 7114(c)(2). If the head of the agency does not approve or disapprove the agreement within 30 days from its execution, the agreement shall take effect and be binding on the government and the union. The FLRA has determined that in instances in which a final decision of the Panel resolves all issues between the parties and there is nothing left for them to negotiate, the date of the Panel order shall be considered the date on which the parties' agreement was executed for the purpose of agency head review under 5 U.S.C. § 7114(c). See American Federation of Government Employees and Department of Veterans Affairs, 40 FLRA 195 (1991); American Federation of Government Employees and Department of Veterans Affairs, 39 FLRA 1055 (1991); National Treasury Employees Union and Federal Deposit Insurance Corporation, 39 FLRA 848 (1991); International Organization of Masters, Mates and Pilots and Panama Canal Commission, 36 FLRA 555 (1990). In its decision in this case, the Panel indicated its view that under the FLRA precedents its order would be final and subject to agency head review as of the date of its issuance.

The Panel's order was issued May 13, 1992, during fiscal year 1992. Had the National Guard approved the Panel's order, or had 30 days elapsed without it taking any action, the order would have been binding on both the National Guard and the union. In such instance we would consider the National Guard's appropriations to be obligated for the costs of paying uniform allowances no later than June 13, 1992, the thirty-first day after the Panel's order, regardless of when the parties actually modified their collective bargaining agreement consistent with the Panel's order. However, on June 9, 1992, within the 30-day statutory review period, the National Guard disapproved and refused to implement the Panel's order.

Under 5 U.S.C. § 7114(c)(2) an agency head can refuse to approve a collective bargaining agreement, including provisions included in an agreement under an order of the Panel, only if it is inconsistent with law. In disapproving the Panel's order in this case the National Guard asserted that it had no statutory authority to provide uniform allowances to military technicians and thus could not comply with the order. However, in determining that the National Guard's refusal to approve the order constituted an unfair labor practice, the FLRA indicated that it had already been determined in a previous case that the National Guard did have statutory authority to implement a uniform provision nearly identical to the one ordered by the Panel here. Therefore, the FLRA determined, in effect, that the National Guard agency head did not have a legitimate basis for disapproving the Panel order under 5 U.S.C. § 7114(c)(2).

Since the disapproval of the Panel order was beyond the agency head's authority under 5 U.S.C. § 7114(c), it had no legal effect. Therefore, the Panel's order became final on June 13, 1992, under 5 U.S.C. § 7114(c)(3). It follows that the National Guard fiscal year 1992 Operation and Maintenance appropriations were obligated, in an amount equal to the cost of paying the uniform allowances required to be paid to technicians during that year under the provision mandated by the Panel. Further, since the uniform requirement continued in effect under the collective bargaining agreement for fiscal years 1993 and 1994, the Operation and Maintenance appropriations were obligated for those years, in the amounts equal to the costs of paying allowances during those years.

The National Guard should adjust its books under 31 U.S.C. § 1553 to reflect these previously unrecorded obligations. We note that the fiscal year 1992 appropriation accounts closed on September 30, 1997, under 31 U.S.C. § 1552(a), and may no longer be used for any purpose.

In his letter, the Chief Counsel also asks that we address other issues presented in the original submission by the USPFO for Louisiana relating to the propriety of the National Guard complying with the collective bargaining agreements and the order of the Panel. As we indicated in a letter to the USPFO, dated October 25, 1996, the "exclusivity" provision of the Civil Service Reform Act, 5 U.S.C. § 7121(a), deprived

the General Accounting Office of jurisdiction to consider any matter that is properly within the jurisdiction of the FLRA or other administrative body. We are therefore precluded from answering any questions regarding the propriety of implementing the Panel order or the amended collective bargaining agreement.

Comptroller General
of the United States